

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

WILLIAM CHUNG,	)	No. 63846-7-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
JOSEPH OH and HAE Y. OH, husband	)	UNPUBLISHED
and wife,	)	
	)	FILED: <u>October 5, 2009</u>
Respondents.	)	
	)	
	)	

Cox, J. — “A trial court should grant a motion to dismiss pursuant to CR 12(b)(6) only ‘if it appears beyond a reasonable doubt that no facts exist that would justify recovery.’”<sup>1</sup> Here, William Chung commenced this action on an unpaid check written to him by Joseph Oh more than five but less than six years from the date of the check. The trial court erred as a matter of law in dismissing this action on the basis of a three-year statute of limitations applicable to an alleged oral agreement relating to the unpaid check. Moreover, the imposition of sanctions against Chung was an abuse of discretion. We reverse and remand for further proceedings.

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<sup>1</sup> Atchison v. Great Western Malting Co., 161 Wn.2d 372, 376, 166 P.3d 662 (2007) (quoting Cutler v. Phillips Petroleum, Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994)).

We accept the facts alleged in Chung's complaint as true, as we must when reviewing the grant of a CR 12(b)(6) motion.<sup>2</sup> On January 21, 2003, Oh wrote a personal check to Chung in the amount of \$20,000. Oh asked Chung not to deposit the check until Oh gave him permission to do so. Complying with Oh's request, Chung did not attempt to deposit the check for some time.

More than 180 days later, Chung presented the check to the drawee bank in an attempt to deposit the check. The bank declined to deposit the check because it was more than 180 days old. The check remains unpaid.

On February 27, 2008, Chung commenced this action against Oh, his wife, and their marital community. Oh responded by moving to dismiss pursuant to CR 12(b)(6) and filing and serving an answer. Chung then moved to amend the complaint. The trial court granted Chung's motion, but also granted Oh's motion to dismiss. The court denied Chung's motion for reconsideration and imposed sanctions against Chung under CR 11 and RCW 4.84.185.

Chung appeals.

### **CR 12(b)(6)**

Chung argues that the trial court erred in dismissing his suit under CR 12(b)(6). We agree.

Under CR 12(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. "A trial court should grant a motion to dismiss pursuant to CR 12(b)(6) only 'if it appears beyond a reasonable doubt

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<sup>2</sup> Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

that no facts exist that would justify recovery.”<sup>3</sup> Even hypothetical facts conceivably raised by the complaint may defeat a dismissal.<sup>4</sup> We review de novo CR 12(b)(6) rulings.<sup>5</sup>

Washington follows notice pleading rules and simply requires a “concise statement of the claim and the relief sought.”<sup>6</sup> The pleader’s intention when drafting the complaint does not control the court’s scope of review.<sup>7</sup> A complaint “cannot be dismissed upon a CR 12(b)(6) motion if it is found to adequately allege a claim based upon some theory other than that advanced by the plaintiffs.”<sup>8</sup>

Here, a fair review of the pleadings before the court at the time of the motion shows that Chung’s claim is based on Oh’s unpaid check for \$20,000.<sup>9</sup>

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<sup>3</sup> Atchison, 161 Wn.2d at 376 (quoting Cutler, 124 Wn.2d at 755).

<sup>4</sup> Bravo v. Dolsen Companies, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

<sup>5</sup> Id.

<sup>6</sup> Champagne v. Thurston County, 163 Wn.2d 69, 84, 178 P.3d 936 (2008) (quoting Pac. NW Shooting Park Ass’n v. City of Sequim, 158 Wn.2d 342, 352, 144 P.3d 276 (2006)).

<sup>7</sup> Id. at 86 (citing Berge v. Gorton, 88 Wn.2d 756, 567 P.2d 187 (1977)).

<sup>8</sup> Berge, 88 Wn.2d at 762.

<sup>9</sup> Chung’s first amended complaint is captioned, “FIRST AMENDED COMPLAINT FOR FAILURE TO PAY MONEY OWED BASED ON WRITTEN INSTRUMENT.” The relevant portion of the complaint states:

### **3. STATEMENTS OF FACTS AND ALLEGATIONS**

3.1 On or about January 21, 2003, Defendant Joseph Oh became indebted to Plaintiffs in the amount of \$20,000.00.

3.2 Defendant Joseph Oh then issued a check for \$20,000.00 to

Notwithstanding the fact that the complaint and amended complaint give fair notice of this claim for an unpaid check, Oh argued below that Chung's claims were barred by the three-year statute of limitations for oral contracts. It appears this argument is based on the theory that the check allegedly arose from an oral agreement between the parties.

Chapter 62A.3 RCW governs negotiable instruments, including checks.<sup>1</sup> "Check" is defined, in relevant part, as "(i) a draft, other than a documentary draft, payable on demand and drawn on a bank . . . ." <sup>11</sup> Chapter 62A.3-118(c) provides, in relevant part, "an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within **six years** after dishonor of the draft or **ten years** after the date of the draft, **whichever period**

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Plaintiff for the indebtedness.

3.3 Defendant Joseph Oh then asked Plaintiff not to deposit the check until he authorizes.

3.4 Based on such request, the check was not deposited.

3.5 Plaintiff later attempted to deposit the check, but was informed by the drawing bank that because the check was over 180 days old, it could not be deposited. As such, the check remains unpaid.

3.6 Plaintiff made numerous demands to pay the debt, but Defendants steadfastly refused.

3.7 To date, the \$20,000 check remains unpaid.

Clerk's Papers at 75-76.

<sup>1</sup> RCW 62A.3-104(f).

<sup>11</sup> Id.

***expires first.***<sup>12</sup>

Chung commenced this action on February 27, 2008. This was more than five years, but less than six years, after Oh issued the check. Accordingly, the action was timely under the above Uniform Commercial Code (UCC) provisions governing checks.<sup>13</sup>

We note that Chung's briefing to the trial court in response to the motion to dismiss made reference to UCC provisions at several points. Perhaps most significantly, Chung pointed to the UCC's definitions of "negotiable instrument" and "check" in his response to Oh's motion to dismiss. Though Chung did not then cite the UCC's statute of limitations, nothing required him to do so for purposes of surviving the very high standards of a 12(b)(6) motion. It was clear that the action was one on a check, not one on an oral agreement. The fact that the check was written following an oral transaction between the parties does not alter the analysis or conclusion.

Oh argues that the trial court properly dismissed Chung's claims under CR 12(b)(6). After Chung filed the amended complaint, Oh's motion to dismiss relied primarily on a theory that checks typically do not form or constitute contracts. He argued to the trial court, and now argues on appeal, that the claim was barred by the three-year statute of limitations for oral contracts. He cites National Bank of Commerce of Seattle v. Preston<sup>14</sup> as controlling authority. But

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<sup>12</sup> (Emphasis added.)

<sup>13</sup> RCW 62A.3-118.

National Bank of Commerce is factually and analytically distinguishable from this case.

The issue in National Bank of Commerce was whether check stubs containing the notation “loan” and the corresponding checks constituted written loan agreements governed by the six-year statute of limitations.<sup>15</sup> Here, the issue is whether the governing statute of limitations for suit on the unpaid check is six years under the UCC or three years for oral contracts. It is irrelevant whether the check is based on a loan for purposes of surviving this CR 12(b)(6) motion.

Oh next argues that the trial court “cannot be said to have erred at all with respect to the applicability of RCW 62A.3-118 to the propriety of its decision to dismiss Chung’s action” because the trial court was never invited to consider that statute in its dismissal of the action. But a complaint cannot be dismissed upon a CR 12(b)(6) motion if it is found to adequately allege a claim based upon some theory other than that advanced by the plaintiffs.<sup>16</sup> Chung’s amended complaint gave Oh fair notice that he sought to enforce an obligation for an unpaid check. Furthermore, as described above, Chung’s briefing referenced UCC provisions several times. And Chung cited the UCC’s statute of limitations in his reply brief on his motion for reconsideration. Oh’s argument that the

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<sup>14</sup> 16 Wn. App. 678, 558 P.2d 1372 (1977).

<sup>15</sup> National Bank of Commerce, 16 Wn. App. at 678.

<sup>16</sup> Berge, 88 Wn.2d at 762.

statute of limitations was not argued to the court is simply not supported by this record.

Oh next argues that the trial court's ruling should be affirmed because RCW 62A.3-305 applies. But his reference to this UCC statutory defense is insufficient to meet the high standards of CR 12(b)(6). The record is inadequate to show that, in light of this purported defense, it is "beyond a reasonable doubt that no facts exist" that would justify Chung's recovery.<sup>17</sup> Simply stated, to have granted the motion based on the asserted defense grounded on RCW 62A.3-305 and this record was premature.

For the first time at oral argument, Oh argued that RCW 62A.3-117 also supports the trial court result. We need not address arguments not made in the briefing of the parties.<sup>18</sup> This, too, is a matter that may be pursued on remand.

### **ATTORNEY FEES**

Chung argues that the trial court abused its discretion by awarding Oh attorney fees under CR 11 and RCW 4.84.185. We agree.

A complaint must lack a factual or legal basis before it can become the proper subject of CR 11 sanctions.<sup>19</sup> If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into

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<sup>17</sup> Atchison, 161 Wn.2d at 376 (quoting Cutler, 124 Wn.2d at 755).

<sup>18</sup> RAP 12.1(a).

<sup>19</sup> Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

the factual and legal basis of the claim.<sup>2</sup>

Under RCW 4.84.185, a court may, upon finding that an action was “frivolous and advanced without reasonable cause,” require a nonprevailing party to pay the prevailing party reasonable expenses, including attorney fees.

Attorney fees under either CR 11 or RCW 4.84.185 are reviewed for an abuse of discretion.<sup>21</sup>

As explained above, it cannot be said that either Chung’s action lacked a factual or legal basis, or that it was advanced without reasonable cause. This is an unpaid check case, not a suit on an oral agreement, which survives for further proceedings. Dismissal of the action was an abuse of discretion.

Chung also seeks fees on appeal based on RCW 62A.3-515. That statute permits the award of reasonable attorney fees in certain circumstances. Such an award is premature because it is unclear from this record whether and to what extent the conditions for such an award have been satisfied.

We reverse the grant of the CR 12(b)(6) motion and the award of sanctions. We deny any award of fees as premature, and remand for further proceedings.

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<sup>2</sup> Id.

<sup>21</sup> Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004).



Cox, J.

WE CONCUR:

Jan, J.

Appelwick, J.